SERVED: June 26, 1992

NTSB Order No. EA-3611

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of June, 1992

BARRY LAMBERT HARRIS, Acting Administrator, Federal Aviation Administration, Complainant, v. CLAUDE SCHLAGENHAUF, JR., Respondent.	Docket SE-12510

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Jimmy N. Coffman issued in this proceeding on May 8, 1992 at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed an emergency

[1]An excerpt from the hearing transcript containing the initial decision is attached. Although the initial decision sets forth the law judge's ultimate judgment on the adequacy of the Administrator's evidentiary showing on the allegations in this matter, it falls short of providing the "statement of findings and conclusions, and the grounds therefor, upon all material

order of the Administrator revoking all of respondent's airman certificates, including his Airline Transport Pilot certificate (No. 001757181), his Flight Instructor certificate (No. 1757181 CFI), and his Mechanic certificate, with Airframe and Powerplant ratings (No. 250601394) for his alleged violations of sections 61.3(d)(1) and (2), 61.19(a), and 61.59(a)(2) of the Federal Aviation Regulations, 14 CFR Part 61.[2] For the reasons discussed

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issues of fact, credibility of witnesses, law, or discretion presented on the record, the appropriate order, and the reasons therefor" that Section 821.42(b) of the Board's Rules of Practice contemplates. See 49 CFR Part 821.

[2]FAR sections 61.3(d)(1) and (2), 61.19(a), and 61.59(a)(2) provide as follows:

"§61.3 **Requirement for certificates, rating, and authorizations.**

* * * * *

(d) Flight instructor certificate. Except for lighter-than-air flight instruction in lighter-than-air aircraft, and for instruction in air transportation service given by the holder of an Airline Transport Pilot Certificate under §61.169, no person other than the holder of a flight instructor certificate issued by the Administrator with an appropriate rating on that certificate may--

(1) Give any of the flight instruction required to qualify for a solo flight, solo cross-country flight, or for the issue of a pilot or flight instructor certificate or rating;

(2) Endorse a pilot logbook to show that he has given any flight instruction; or....

"§61.19 **Duration of pilot and flight instructor certificates.**

(a) General. The holder of a certificate with an expiration date may not, after that date, exercise the privileges of that certificate.

"§61.59 **Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**

(a) No person may make or cause to be made--

* * * * *

(2) Any fraudulent or intentionally false entry in any logbook,

below, we will deny the appeal.[3]

The Administrator's April 10, 1992 Emergency Order of Revocation, which served as the complaint against the respondent in this proceeding, alleges, in pertinent part, that:

> 1. At all times material herein you were and are the holder of Airline Transport Pilot certificate number 001757181.
>
> 2. On or about April 23, 1989, you were issued Flight Instructor certificate number 001757181CFI. This certificate expired on April 30, 1991.
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> 3. On April 24, 1991, you attempted, without success, to renew Flight Instructor certificate number 1757181CFI and were issued a "Notice of Disapproval of Application".
>
> 4. On August 22, 1991, you satisfactorily completed the requirements for a Flight Instructor certificate and your [sic] were issued a temporary airman certificate number 1757181CFI, authorizing you to exercise the privileges of flight instructor.
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> * * *
>
> 6. On August 7, 1991, you gave flight instruction to Patrick Lee McSwain, a student pilot, and charged Mr. McSwain $25.00 per hour for 8.1 hours of instruction. On that date you signed the logbook of the above student pilot and, after your signature, printed CFI1757181.
>
> 7. On August 8, 1991, you gave flight instruction to Private Pilot Kelly I. Girting and charged her $25.00 per hour for 1.1 hours

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record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or [sic] any certificate or rating under this part...."

[3]The Administrator has filed a reply brief opposing the appeal.

> of instruction. On that date you signed the logbook of Ms. Girting and, after your signature, printed CFI1757181.
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> 8. On August 13, 1991, you gave flight instructions [sic] to Private Pilot Kelly I. Girting and charged her $25.00 per hour for 1.9 hours of instruction. On that date, you signed the logbook of Ms. Girting and, after your signature, printed CFI1757181.
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> 9. On August 15, 1991, you gave flight instructions [sic] to Private Pilot Kelly I. Girting and charged her $25.00 per hour for 2.1 hours of instruction. On that date, you signed the logbook of Ms. Girting and, after you [sic] signature, printed CFI1757181.
>
> 10. On August 24, 1991, you asked to see the logbook of Ms. Girting. When she gave you her logbook, you altered the endorsements previously entered in the logbook on August 8, 13, 15, 1991, by erasing that portion of the endorsement which read CFI1757181 (as cited in paragraphs 7, 8, and 9 above) and wrote over the erasures ATP1757181 Safety Pilot.
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> 11. During the period from June 27, 1991 through August 20, 1991, you gave flight instructions [sic] to Norris Gregory VanDyke, a student pilot, on seventeen separate flights and charged him $25.00 per hour for 12.5 hours of instruction.

Although respondent does not dispute these factual allegations, he nevertheless argues that his conduct did not run afoul of any regulation. We do not concur in his assessment.[4]

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[4]Inasmuch as the complaint clearly raised an issue of lack of qualifications, the law judge properly denied a motion to dismiss the charges, brought some 8 months after the Administrator obtained information respecting them, as stale under Section 821.33 of the Board's Rules of Practice, 49 CFR Part 821, which essentially requires, to avoid dismissal, that charges that do not raise a qualifications issue be brought within 6 months. See Administrator v. Wingo, 4 NTSB 1304 (1984). Respondent made no showing that revocation would not be the appropriate sanction if the Administrator's charges were

Oversimplified, respondent appears to contend on appeal, with respect to the alleged violation of section 61.3(d)(1), that not all flight instruction (FI) by non-instructors is prohibited, just FI that is, in the words of the regulation, "required to qualify for a solo flight, solo cross-country flight, or for the issue of a pilot or flight instructor's certificate or rating" (emphasis added). He therefore argues, in effect, that because he did not endorse for solo flight or for any other purpose the certificates of the students referenced in the complaint, the FI he gave to them does not fall within the "required to qualify" category. We find respondent's argument unavailing, for, among other deficiencies which do not warrant comment, it is predicated on the untenable position that a signature in a logbook is not an endorsement unless it is coupled with some indication that a certain level of proficiency has been achieved or some statement attesting that the student has completed the prerequisites "required to qualify" him to progress to the next step in his training. In our judgment, the fact that the Administrator prescribes or recommends the terminology[5] to be used for some logbook or certificate endorsements for specific proficiency-related acknowledgements, approvals, or recommendations does not

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sustained.

The law judge also properly declined to review the bona fides of the Administrator's declaration of an emergency in this proceeding. See Administrator v. Sallee's Aviation, Inc., NTSB Order No. EA-3185 (1990).

[5]See Respondent's Exh. 2, which is a copy of FAA Advisory Circular AC61-65C, Appendix 1.

mean that an unprescribed description or summary of instruction given cannot also be considered an endorsement. The important factor, it seems to us, is whether the entry, without regard to its content, has been subscribed. If it has been, the signer, or endorser, vouches his belief in the truth of the information there recorded.

Notwithstanding the testimony of respondent's two expert witnesses, who appear to believe that FI such as respondent gave is not prohibited under the FAR, we think there is no doubt that respondent breached section 61.3.[6] It is essentially uncontested on the record before us that the FI respondent gave to the two student pilots referenced in the complaint was to prepare them for solo operation, and that the FI he gave to the private pilot student referenced in the complaint was to prepare her for an instrument rating. We need go no further than the explicit language of section 61.3(d)(1) to conclude that respondent could not lawfully provide such instruction because he did not hold a flight instructor's certificate.[7] For the same reason,

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[6]The precise basis for the witnesses' views in this connection was not identified. It may be, however, that they are misinformed as to the scope of FI an ATP may give pursuant to his authority to instruct in "air transportation service," a phrase which is not defined in the FAR, but one we assume relates to training in commercial operations for an air carrier. In any event, respondent does not argue that he was instructing the students referenced in the complaint in air transportation service.

[7]As the Board observed in **Administrator v. Damsky**, 3 NTSB 2391, 2394 (1980):

> The certification requirement for instructors is the chief means of insuring the qualifications of these

respondent could not, consistent with the prohibition in section 61.3(d)(2), lawfully indicate by his signature in two of the students' logbooks that he had given them any FI.

Notwithstanding respondent's denial of any intent to falsify the logbooks in which he signed his name and printed after it "CFI1757181," the law judge affirmed the alleged violations of section 61.59(a)(2), thereby implicitly rejecting, as a matter of credibility, respondent's testimony that his use of the letters "CFI" after his signature in four separate logbook entries was inadvertent.[8] Nothing in respondent's appeal brief persuades us that the law judge's credibility assessment against him on this point should be overturned. Indeed, the law judge's expressed view that respondent "simply got caught giving flight instruction

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> individuals and the quality of instruction they in turn impart to students. Developing good habits and sound student practices are undoubtedly related to safety and the Administrator has a legitimate interest in confining instruction of students to those individuals whom he has determined possess the requisite qualifications.

[8]Respondent asserts here, as he did before the law judge, that the CFI designation was mistakenly placed after his signature simply by force of habit, and that he meant to put "ATP." We find this assertion difficult to credit. If respondent was so in the habit of endorsing logbooks as a certificated flight instructor that he unconsciously printed CFI instead of ATP, one wonders why none of the false endorsements included the expiration date for his CFI, which, according to respondent's evidence, must be given for any CFI endorsement to be valid. We think, like the Administrator and, presumably, the law judge, that the omission was purposeful. Since a 24 month renewal of respondent's expired flight instructor certificate would run from April, 1991, respondent could, after requalifying for the certificate, add an April, 1993 expiration date to his students' logbook at some later date and no one would be able to tell from the logbook entries that he had not been continuously certificated.

while he knew his certificate was not current..." amply demonstrates, at the very least, the law judge's belief that respondent was fully aware that he could not, consistent with applicable regulations, provide the FI at issue in this proceeding. His affirmance of the falsification charge in these circumstances establishes, as well, the law judge's conclusion that respondent intentionally signed the logbooks as CFI even though he knew he could not exercise the privileges of his expired instructor's certificate.

We find no merit in respondent's contention that the false entries cannot be considered material because they would not be credited by an examiner toward any certificate or rating in the absence of an expiration date for the CFI certificate and, therefore, the flight time falsely endorsed by respondent can not constitute entries in a logbook that are "required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, [of] any certificate or rating under" Part 61. In the first place, there is no question but that the three students needed to obtain and log FI of the kind respondent gave them in order to advance their aviation goals, and that the FI was acquired by them for that purpose.[9] Thus, the flight time was required to be kept by them, within the

[9]In a case involving arguments similar to those raised by the respondent here, the Board stated "[t]he applicability of [section 61.59(a)(2)] is governed by the purpose for which the students maintained their logbooks and not by respondent's intent in making entries therein." **Administrator v. Damsky,** 3 NTSB 543, 545 (1977).

meaning of the regulation, we believe, without regard to whether it was ever actually presented to the FAA "to show compliance with any requirement for the issuance, or exercise of the privileges, [of] any certificate or rating," or whether, if presented, it could or would have been relied on. It is not the tendering of false or fraudulent information that the regulation reaches, but, rather, its placement in a "logbook, record, or report" that might be tendered to show compliance with specified requirements. See Administrator v. Cassis, 4 NTSB 555 (1982), aff'd Cassis v. Helms, 737 F.2d 545 (6th Cir. 1984). Consequently, the possibility that the entries would be rejected as invalid if submitted to the FAA does not defeat their materiality as one of the three necessary elements, along with knowledge and intent, of the intentional falsification offense proscribed by section 61.59(a)(2).[10]

Contrary to the position of respondent on appeal that revocation for the offenses affirmed is excessive, the law judge correctly recognized that revocation for even one of the falsifications established would be consistent with Board

[10]The three cited elements must, as was done in this case, be proved to establish an intentional falsification. See, e.g., **Administrator v. Zumwalt**, NTSB Order No. EA-3304 (1991), at p. 4, n. 4. To prove a fraudulent statement under the regulation, it must also be shown that there was an intent to deceive and action taken in reliance on the deception. **Hart v. McLucas**, 535 F.2d 516, 519 (1976). In light of these cases, the facial invalidity of the logbook entries in this proceeding would likely keep them from being found to be fraudulent. At the same time, it should not go unnoticed that his three students, surprised to learn that he was not certificated to give them the FI they had paid for, were certainly hoodwinked, if not actually defrauded.

precedent. See, e.g., **Administrator v. McCarthney**, NTSB Order No. EA-3245 (1990). Given the fact that this proceeding involved other, serious misconduct in addition to the several falsifications found by the law judge to have been proved, revocation was clearly the only appropriate sanction.[11]

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and

2. The emergency order of revocation and the initial decision are affirmed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[11]Respondent's suggestion that the law judge's adherence to agency precedent on the issue of sanction represents an abdication of responsibility reflects, we think, a lack of appreciation of the fact that a law judge in an administrative adjudication before the Board has only such authority as we have delegated to him. We have not empowered our law judges to disregard Board policy judgments on matters of sanction. In any event, while the law judge expressed the view that he did not have the discretion to impose a sanction less than revocation, he did not state that he would impose a lesser sanction if he had the discretion to do so.